Supreme Court, U.S.
FILED

94 626 OCT - 5 1994

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

October Term 1994

Leon C. Baker, Petitioner

v.

J.R. Bennett and Laura Bennett, Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Arthur R. Miller
Attorney for Petitioner
1545 Massachusetts Ave.
Cambridge, Massachusetts 02138
Tel.: (617) 495-4111

Date: October 5, 1994

QUESTIONS PRESENTED

1. Did the Florida courts improperly give issue preclusion effect under the Full Faith and Credit Clause of the United States Constitution to an Alabama judgment despite the following undisputed facts showing that petitioner did not receive a full and fair hearing before an impartial tribunal?

A. Counsel for respondents contributed at least $100,000 to the election campaigns of members of the Alabama Supreme Court.

B. The Alabama Supreme Court held *sua sponte* that the Alabama courts had personal jurisdiction over petitioner on a theory that had not been raised below and had not been briefed or argued in the trial court and denied petitioner any opportunity to show that its decision was contrary to decisions of this Court under the Fourteenth Amendment limiting the personal jurisdiction of state courts.

C. The Alabama Supreme Court imposed liability on petitioner under Alabama law when no liability existed under the laws of any of the

relevant jurisdictions -- New York, Florida, or England.

D. The Alabama Supreme Court upheld the trial court's toleration of blatant appeals by respondents' counsel to regional and other bias.

E. The Alabama Supreme Court, in order to hold petitioner liable, overturned both procedural and substantive precedents, which until this case had been in accord with settled law in other common law jurisdictions.

2. Was it a denial of due process of law for the Florida courts to give issue preclusion effect to the decision of the Alabama Supreme Court under the circumstances set forth in Question 1?*

*The holdings of the Florida courts were (a) that the facts set forth in A through E, individually and collectively, do *not* raise a question of fact as to whether petitioner received a full and fair hearing in the Alabama Supreme Court and (b) that accordingly summary judgment was properly granted against petitioner without any opportunity to inquire further into the facts by discovery.

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES..... v

OPINION BELOW..... 1

JURISDICTION..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 2

STATEMENT OF THE CASE..... 3

A. Nature of the Case.....3

B. The Facts.....5

C. The Federal Questions Presented For Review By This Court Were Raised In The Florida Trial and Appellate Courts.....15

REASONS FOR GRANTING THE WRIT.....19

POINT I: CERTIORARI SHOULD BE GRANTED TO CORRECT THE ERROR OF THE FLORIDA COURTS IN GIVING ISSUE PRECLUSION EFFECT UNDER THE FULL FAITH AND CREDIT CLAUSE TO THE DECISION OF THE ALABAMA SUPREME COURT BECAUSE THE MORE THAN $100,000 THAT COUNSEL FOR THE BENNETTS CONTRIBUTED TO ELECTION CAMPAIGNS OF JUSTICES OF THAT COURT AND ITS ANOMALOUS RULINGS GAVE RISE TO AT LEAST AN APPEARANCE OF IMPROPRIETY.....23

TABLE OF CONTENTS (Continued)

POINT II: CERTIORARI SHOULD BE GRANTED TO CORRECT THE ERROR OF THE THE FLORIDA COURTS IN FAILING, BEFORE GIVING FULL FAITH AND CREDIT TO THE ALABAMA JUDGMENT, TO ASCERTAIN WHETHER ALABAMA'S EXERCISE OF PERSONAL JURISDICTION OVER PETITIONER DENIED HIM DUE PROCESS OF LAW BECAUSE HE HAD NO CONTACTS WITH ALABAMA OTHER THAN UNSOLICITED TELEPHONE CALLS FROM ALABAMA TO HIM IN NEW YORK.....33

CONCLUSION.....41

SUPPLEMENT: EXCERPT FROM AMERICAN JUDICATURE SOCIETY: ELECTING JUSTICE: A HANDBOOK OF JUDICIAL ELECTION REFORMS.....S-1

CASES

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986).....26, 32

Allen v. McCurry, 449 U.S. 90 (1980)..... 26, 28

Allstate Insurance Co. v. Hague, 449 U.S. 302, 312-13 (1981)..... 11

American General Life Insurance v. Lykes, 540 So.2d 696 (Ala. 1989)..... 30

Atchison T & S.F. Ry Co. v. Wells, 265 U.S. 101 (1924)... 39

Baker v. Bennett, ____ U.S. ____, 114 S. Ct. 1260, 122 L. Ed. 2d 658 (1993)..... 29

Beasley v. Schuessler, 519 So.2d 551 (Ala. Civ. App. 1987)..... 29

Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888 (1988) 38

Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959)... 38

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985)..... 35

Davis v. Farmers Cooperative Equity Co., 262 U.S. 312 (1923)..... 39

Estes v. Nix, 401 So.2d 62 (Ala. Civ. App. 1981)..... 30

Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).....37

International Shoe Co. v. Washington, 326 U.S. 310 (1945)..... 35, 36

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988)..... 32

Montana v. U.S., 440 U.S. 147, 164 n. 11 (1979)..... 26

New York Central R.R. Co. v. Johnson, 279 U.S. 310 (1929)..... 12

Pappas v. Middle Earth Condominium Ass'n, 963 F.2d 534 (2d Cir. 1992)..... 31

St. Paul & Sault Ste. Marie Ry. Co. v. Moquin, 283 U.S. 520 (1931)..... 31

Southern Pacific Co. v. State of Arizona, 325 U.S. 761 (1945)..... 38

Tetco Metal Products, Inc. v. Langham, 387 F.2d 721 (5th Cir. 1968)..... 29

Viereck v. U.S., 318 U.S. 236 (1943)..... 32

Ward v. Village of Monroeville, 409 U.S. 57 (1972)..... 32

CONSTITUTIONAL PROVISIONS

U.S. Constitution
Article II, §8..... 2
Article IV, §1..... 2, 4, 5, 16, 19, 20, 22, 23, 33, 34, 41

U.S. Constitution, Fourteenth Amendment..... 3, 4, 19, 21, 34, 41

STATUTES

Florida Uniform Enforcement of Foreign Jugments Act, Fla. Stats. §55.501 through §55.509 ..... 3, 15

Rule 9.120 d), Fla. R. App. P. 18

Alabama Rules of Civil Procedure, Rule 4.2(a)(2)(I) 3

28 U.S.C. §455 33

28 U.S.C. §1257(3) 2

OTHER AUTHORITIES

Electing Justice: A Handbook of Judicial Election Reforms, American Judicature Society (1990) 20

Electing Justice: The Law and Ethics of Judicial Election Campaigns, American Judicature Society (1990) 20, 24, 25

Miller & Crump, Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts, 96 Yale L.J. 1, 15 n. 109 (1986) 11

Note, Disqualifying Elected Judges From Cases Involving Campaign Contributors, 40 Stanford L. Rev. 449 (1988) 25

No. _____

In the Supreme Court of the United States

October Term, 1994

Leon C. Baker, Petitioner

v.

J.R. Bennett and Laura Bennett, Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Petitioner Leon C. Baker ("Baker") prays that a Writ of Certiorari be issued to review the opinion and judgment of the Fourth District Court of Appeal of the State of Florida rendered on March 2, 1994. The Supreme Court of Florida declined jurisdiction on July 7, 1994.

OPINION BELOW

The Florida Supreme Court issued no opinion in declining jurisdiction. The decision of the Florida Fourth

District Court of Appeal is not yet reported and is set forth at page A-3 of the Appendix.

JURISDICTION

The decision of the Florida Fourth District Court of Appeal was entered on March 2, 1994. Petitioner's application for rehearing was denied on March 15, 1994. The Florida Supreme Court declined discretionary jurisdiction of Baker's appeal on July 7, 1994. This Petition for a Writ of Certiorari was filed within 90 days of the order of the Florida Supreme Court declining jurisdiction. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article II, §8 of the United States Constitution provides in pertinent part:

> The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes * * *.

Article IV, §1 of the United States Constitution provides in pertinent part:

> Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty or property, without due process of law * * *.

The Florida statutory provision involved is the Florida Uniform Enforcment of Foreign Judgments Act, Fla. Stats. §55.501 through §55.509, which is set forth at pages A-67 through A-70 of the Appendix to this Petition.

STATEMENT OF THE CASE

A. Nature of the Case

Baker brought this action under the Florida Uniform Enforcement of Foreign Judgments Act, Fla. Stats. §55.501 through §55.509, to challenge the validity of a judgment the respondents ("the Bennetts") had obtained against him in Alabama and which they had filed with the Clerk of Palm Beach County, Florida. Baker alleged that the Alabama courts had no personal jurisdiction over him.

The Bennetts responded that Baker is barred from asserting Alabama's lack of jurisdiction by issue preclusion under the Full Faith and Credit Clause of the United States Constitution, because the Alabama Supreme Court had ruled that the Alabama courts had personal jurisdiction over

him.

Baker rejoined that the decision of the Alabama Supreme Court may not be given issue preclusion effect under the Full Faith and Credit Clause (a) because it is tainted by an appearance of impropriety and (b) because Baker did not receive a full and fair hearing on personal jurisdiction in the Alabama Supreme Court.

The appearance of impropriety stems from the fact, among others, that counsel for the Bennetts contributed more than $100,000 to the election campaigns of justices of the Alabama Supreme Court. Moreover, the hearing Baker received on jurisdiction was neither full nor fair because he was not given an opportunity to present decisions of this Court showing that the Alabama Supreme Court's *sua sponte* ruling on jurisdiction violated the Fourteenth Amendment of the United States Constitution.

The Florida courts nevertheless applied issue preclusion under the Full Faith and Credit Clause and have refused to consider Baker's contention that the Alabama courts had no constitutional power to enter a judgment against him.

B. The Facts[1]

The Alabama lawsuit in which the Bennetts obtained their judgment against Baker arose out of the purchase by J.R. Bennett of an interest in computer equipment located in England. The Bennetts' principal purpose was to obtain a deferral of federal and Alabama income taxes.[2] J.R. Bennett purchased his interest from an Alabaman, Donald Gibbs. J.R. Bennett and Gibbs had no prior relationship.

Gibbs and an associate had purchased the computer equipment six months earlier from an English company. Baker, a New York lawyer, had represented the English seller in the purchase by Gibbs and his associate.

The resale by Gibbs of part of his interest to J.R.

[1]The Florida trial court's decision granted summary judgment dismissing petitioner's complaint. The Florida record, therefore, consists solely of pleadings and affidavits. Relevant portions are reproduced in the appendix to this Petition. The record in the Alabama courts has two parts, the reporter's record, a transcript of the trial proceedings, and the clerk's record, pleadings, motions, and other documents filed in the case. Citations to pages of the Alabama transcript are preceded by R (e.g., R32) and to the Alabama clerk's record by C (e.g., C34). Citations to the Appendix to this petition are preceded by A (e.g., A-21). Petitioner's Alabama exhibits are preceded by P (e.g., P21) and respondents' Alabama exhibits are preceded by D (e.g., D4).

[2]Computer "tax shelters" do not avoid taxes. They merely defer taxes by providing accelerated depreciation deductions. When the depreciation ends, the deferred taxes become payable.

Bennett required the consent of Baker's client. The Bennetts' accountants made an unsolicited telephone call to Baker's law office in New York from Alabama to request that Baker ascertain whether his client would consent. The client did.

In a second long distance call also initiated in Alabama by the Bennetts' accountants to Baker in New York, Baker approved, on behalf of his English client, a proposed form of assignmemt from Gibbs.

The Bennetts claim that there was a third telephone call from the Bennetts' accountants to Baker in New York during which J.R. Bennett had a 30 second conversation with Baker. The Bennetts contend that during this brief discourse Baker said that the purchase from Gibbs would give the Bennetts "a good tax shelter." Baker denies that there was any such conversation.[3]

[3]The Bennetts had not claimed that there was any such discussion prior to the trial, which they had ample opportunity to do in J.R. Bennett's deposition or in opposition to Baker's motion to dismiss for lack of jurisdiction.The Bennetts originally based their intentional fraud claim on a 31 page opinion Baker wrote to a third party, but the Bennetts dropped that claim because the opinion was written almost two years after J.R. Bennett's purchase from Gibbs. (C14, 27-57) At the point in the trial the alleged third telephone call was first asserted, the Bennetts needed something to avoid a directed verdict. J.R. Bennett's tardy testimony concerning the alleged 30 second telephone conversation was a convenient *deus ex machina*.

These telephone calls to Baker are the only contacts the Bennetts claim Baker had with Alabama in connection with the Gibbs and Bennett transaction. However, as is set forth below, the Alabama Supreme Court held there was a basis for personal jurisdiction over Baker by virtue of his representation of the English company from which Gibbs and his associate had purchased the computers six months earlier in a completely separate transaction.

Nine years after J.R. Bennett made his purchase from Gibbs, the Bennetts sued Baker in Alabama on the ground that the Internal Revenue Service ("IRS") had disallowed the tax deductions they had claimed.

The Bennetts advanced two theories in seeking a recovery from Baker. First was that Baker acted as their lawyer in advising them that J.R. Bennett was purchasing "a good tax shelter" and that Baker's opinion was erroneous and constituted professional malpractice. The Alabama trial court granted Baker a directed verdict dismissing that count.

Second, the Bennetts contended that Baker's 30 second telephone "opinion" constituted intentional fraud. Baker submitted to the trial court a 60 page memorandum of law demonstrating that, if he did express such an opinion, the opinion was correct. He showed further that if the Bennetts had appealed the ruling of the IRS, the Bennetts very

probably would have prevailed.[4]

The legal conclusions of Baker's memorandum of law were concurred in by an expert witness, James Holden, Esq., former president of the Tax Section of the American Bar Association. (R238-65, 279-83, 292) The Bennetts submitted no response to the 60-page memorandum.

The trial court, over Baker's protest, submitted the issue of the correctness of Baker's opinion to the jury, without giving the jury (a) a copy of the 60 page memorandum of law, (b) any instructions on the correctness of Baker's opinion, or (c) any instructions on applicable tax law.

The Alabama Supreme Court recognized that the trial court erred in submitting the issue of intentional fraud to the jury. Aside from the legal authorities showing that Baker's 30 second telephone "opinion," assuming that one really had been offered, was correct, there was not a shred of evidence that Baker had any doubt as to the correctness of the alleged "opinion," much less that he "knew" it to be

[4]The Bennetts had elected not to appeal the IRS' disallowances to the United States Tax Court or to pay the taxes and bring suit for recovery in a United States district court. Instead they worked out a settlement under which the IRS waived penalties and enhanced interest and left undisturbed accelerated depreciation deductions the Bennetts had claimed for two of the six years in dispute. (R-83, 93, 514, 578, 736-39) The settlement with the IRS left the Bennetts with a substantial net after tax profit on their purchase from Gibbs.

erroneous. The basis on which the Alabama Supreme Court nevertheless affirmed the judgment against Baker is one example of the extraordinarily partial treatment that the Bennetts received from that Court.

The Alabama Supreme Court held that, even though there was no evidence of any intentional misrepresentation or intentional omission to disclose relevant facts, the jury could have found Baker liable for innocent non-disclosure. (Opinion of the Alabama Supreme Court) (A-91-2).[5]

The holding that Baker was liable for such an innocent non-disclosure was a complete departure from prior decisions of the Alabama Supreme Court, which, until Baker's case, had followed the general common law rule that innocent non-disclosure is not a basis for liability for damages.

Since, prior to the Alabama Supreme Court's decision, the Bennetts had been asserting only intentional misrepresentation, there had been no concern as to the applicable law. All of the conceivably relevant jurisdictions --

[5]The "non-disclosure" was that in the alleged 30 second telephone "opinion" Baker had not set forth the supporting authorities; nor had he discussed distinctions he relied on from authorities the IRS might cite, which would be thoroughly analyzed in a full tax opinion. This contact was with a formal tax opinion by Baker to a different client, which was 31 single spaced pages in length.

Alabama, New York, Florida, and England -- do not differ with respect to liability for intentional misrepresentation. But once the Alabama Supreme Court changed Alabama law by imposing liability for innocent non-disclosure, the governing law question became critical.

Baker's innocent non-disclosure, if it occurred at all, took place in New York. The Bennetts incurred damages, if at all, in Florida, where they resided and paid taxes at the time the deductions were disallowed. The "center of gravity" of the transaction arguably was England, where the equipment was purchased, financed, leased, and located. The computers remained in England and there was never any intent to transport them to Alabama or anywhere else. Under the law of all three jurisdictions Baker would not have been liable for innocent non-disclosure.

Baker sought reargument but the Alabama Supreme Court declined to consider any law other than its own newly created Alabama liability for innocent non-disclosure.[6] (A-28)

[6]Refusal to consider the application of law of the relevant jurisdictions raises a serious constitutional question under the Full Faith and Credit Clause of the United States Constitution. It is not a mere error in choice of law. *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 312-13 (1981). See Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 15 n. 109 (1986).

Another respect in which the Alabama Supreme Court was inexplicably deferential to the Bennetts and their counsel was its tolerance of their use of bias and prejudice in argument to the jury. In closing argument, the Bennetts' counsel urged the Alabama jury to "stop lawyers in the biggest law firm in America,"[7] "New York lawyers," "from putting together abusive tax shelters," "costing the taxpayers 1.5 billion dollars a year." (R967, 977-978) Despite the persistent misconduct of the Bennetts' counsel in this regard, Baker's mistrial motions were denied.[8] (R977-78) The jury returned a general verdict in favor of the Bennetts for compensatory damages of $440,025[9] but awarded no

[7]Baker was counsel to Skadden, Arps, Slate, Meagher and Flom, not a member of the firm. At the time he became counsel to the firm, it had only 14 lawyers. It certainly was not the "biggest" in 1981, when Bennett made his purchase from Gibbs.

[8]In *New York Central R.R. Space Co. v. Johnson*, 279 U.S. 310, 318 (1929), this Court declared: "The public interest requires that the court of its own motion, as is its power and duty, protect suiters in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice." Id. at 318 The plaintiff had referred to the defendant as an "eastern railroad," and declared that records and witnesses had been "sent on from New York" for the trial. See also *Viereck v. U.S.*, 318 U.S. 236 (1943).

[9]As noted earlier, under their settlement with the IRS the Bennetts had no actual damages. In fact, rather than merely breaking even, which would be the usual result in a deferral type of tax shelter, the Bennetts had a net after tax profit of approximately $45,000.

punitive damages. (A-63)

On appeal the Alabama Supreme Court held that Baker was not prejudiced by the pejorative references to him because the Bennetts' counsel used these arguments "primarily" in support of their punitive damages claim. Since the jury did not award punitive damages, the Court said, Baker was not prejudiced. (A-63)

The most egregious example of the favoritism that the Alabama Supreme Court showed to the Bennetts was its ruling that Baker was subject to the personal jurisdiction of the Alabama courts. The Court made that ruling *sua sponte* on a theory that totally disregards decisions of this Court that set constitutional limits on a state court's ability to exercise personal jurisdiction over non-residents. The *sua sponte* theory had not been asserted by the Bennetts in the trial court or on the appeal. Nevertheless, the Alabama Supreme Court denied Baker's motion for a rehearing, in which he proposed to demonstrate that the Court's *sua sponte* theory was constitutionally defective.

In his brief in the Alabama Supreme Court, Baker pointed out that a state's specific (or long arm) jurisdiction may be exercised only when the non-resident's alleged liability arises from the same forum contacts as provide the basis for jurisdiction. The alleged professional

malpractice and intentional misrepresentation on which the Bennetts based their claim (and the innocent non-disclosure for which the Alabama Supreme Court held Baker liable) occurred (if at all) in New York. Nevertheless, the Alabama Supreme Court *sua sponte* held that Baker was subject to personal jurisdiction in Alabama because he acted as attorney for his English client in connection with the sale to Gibbs. Baker's alleged liability to the Bennetts, however, did not arise from that earlier transaction, in which the Bennetts in no way were involved. (A48-49)[10]

The Bennetts never had claimed that the Alabama trial court had jurisdiction over Baker on the basis of the earlier transaction between the English seller and Gibbs. Accordingly the issue was not briefed or argued either in the trial court or in the briefs submitted to the Alabama Supreme Court. By deciding the issue *sua sponte* and then denying Baker any opportunity to point out the Court's error, the Alabama Supreme Court denied Baker a full and fair hearing on personal jurisdiction.

Baker's petition for certiorari to this Court to review the

[10]Baker never was in Alabama in connection with the Gibbs transaction either. He prepared the sales agreement in his New York office and transmitted execution copies to his client and Gibbs by mail.

Alabama Supreme Court's decision on personal jurisdiction was denied. *Baker v. Bennett*, ____ U.S. ____, 114 S. Ct. 1260, 122 L. Ed. 2d 658 (1993).

Baker first learned of the more than $100,000 of campaign contributions by the Bennetts' counsel to the election campaigns of justices of the Alabama Supreme Court from a newspaper article published seven months after the decision of the Alabama Supreme Court. The contributions therefore, were not in the record when Baker filed his earlier petition and, consequently, could not have been asserted at that time.

C. The Federal Questions Presented for Review By This Court Were Raised In The Florida Trial and Appellate Courts.

The Bennetts filed a copy of their Alabama judgment with the Clerk of Palm Beach County, Florida while the case was on appeal to the Alabama Supreme Court. Baker sought a declaration under the Florida Uniform Enforcement of Foreign Judgments Act, Fla. Stats. §55.501 through §55.509, that the Bennetts' Alabama judgment against him was void because the Alabama courts did not have personal jurisdiction over him. Since the Alabama Supreme Court had not then ruled, none of the federal questions now presented for review by this Court had yet arisen.

After the decision of the Alabama Supreme Court, the Bennetts moved for summary judgment, declaring that the decision had held that the Alabama Courts did have jurisdiction over Baker and that this was binding on the Florida courts under the Full Faith and Credit Clause. Baker responded that there could be no issue preclusion on jurisdiction under the Full Faith and Credit Clause, because he had not received a full and fair hearing in the Alabama Supreme Court on jurisdiction. (A-39)

Baker pointed out that the Alabama Supreme Court had decided jurisdiction *sua sponte* on a theory that had not been raised by the Bennetts either in the trial court or on appeal and that, therefore, had not been briefed or argued. The Alabama Supreme Court then denied Baker's motion for a rehearing so that he could show that the Court's *sua sponte* theory was contrary to decisions of this Court limiting the personal jurisdiction of state courts over non-residents. Consequently, Baker argued, he had not received the full hearing on jurisdiction in the Alabama Supreme Court that due process requires before the Full Faith and Credit Clause can be applied.

Baker declared in addition that the hearing in the Alabama Supreme Court was not fair because counsel for

the Bennetts contributed over $100,000 to the election campaigns of justices of that Court, which created at least an appearance of impropriety, further undermining any basis for Florida to give full faith and credit to the Alabama judgment. (A-42)

Baker argued also that summary judgment against him had to be denied because there are bona fide issues of fact as to whether there was actual impropriety in the Alabama courts, with respect to which Baker should be permitted to conduct discovery. The Florida trial court, however, without opinion, granted summary judgment dismissing Baker's complaint.

On appeal to the Florida Fourth District Court of Appeal, Baker raised the same points. That Court affirmed in an opinion that did not address Baker's contention that issue preclusion is inapplicable because of the appearance (and possible actuality) of impropriety resulting from (a) the contributions by the Bennetts' counsel of more than $100,000 to the election campaigns of Alabama Supreme Court justices and (b) the rulings of the Alabama Supreme Court that were extremely partial to the Bennetts.

With regard to the fullness of the hearing on jurisdiction, the Fourth District Court of Appeal declared that the Alabama Supreme Court did not deny Baker a full hearing

when it decided the issue on a theory it advanced *sua sponte* and which had not been argued or briefed, because an appellate court may affirm a correct decision of a trial court on a theory different from that of the trial court. (A-7) It did not consider the possible constitutional invalidity of the Alabama Supreme Court's *sua sponte* theory or that the Alabama trial court's assertion of jurisdiction over Baker could not have been sustained under any theory.

Baker unsuccessfully sought a rehearing, pointing out that the denial of a full hearing did not occur when the Alabama Supreme Court *sua sponte* propounded a novel theory that had not been briefed or argued. The denial of a full hearing occurred only subsequently, when the Alabama Supreme Court denied Baker an opportunity to show that the Court's *sua sponte* decision is contrary to decisions of this Court on jurisdiction and is constitutionally incorrect on any theory.

A petition requesting that the Florida Supreme Court exercise its discretionary jurisdiction must be accompanied by a brief "limited solely to the issue of the Supreme Court's jurisdiction."[11] Consequently Baker was prohibited from raising in the Florida Supreme Court the federal questions

[11]Rule 9.120(d), Fla. R. App. P.

now presented for review by this Court. The Florida Supreme Court declined jurisdiction without opinion.

REASONS FOR GRANTING THE WRIT

This petition raises four questions that are well worthy of consideration by this Court. The first is whether a litigant has received a fair hearing by an impartial tribunal for purposes of the Due Process and Full Faith and Credit Clauses when counsel for the other party has made very large contributions to the election campaigns of the judges who decided the case. That question is posed by this petition not merely in theory but in a graphic and compelling way because of the actual partiality of the Alabama Supreme Court reflected in a series of one sided rulings (a) that were either anomalous or constitutionally infirm or (b) that overturned previously settled law that would have mandated judgment in Baker's favor.

The Full Faith and Credit Clause bars a court in a second state from questioning whether the initial court decided the case correctly. A judgment rendered without due process of law is another matter. To give full faith and credit to such a judgment compounds the constitutional violation. In this case the Florida courts held that the Full Faith and Credit Clause prohibits a court which is asked to

enforce a judgment from considering whether the initial court violated other provisions of the Constitution, in particular, the due process requirement of a fair and impartial hearing. This Court should grant certiorari so that it can make clear that the Full Faith and Credit Clause does not override other provisions of the Constitution.

The supplement to this petition contains an excerpt from the American Judicature Society publication *Electing Justice: A Handbook of Judicial Election Reforms* 47-48 (1990) that sets forth six egregious examples of the pernicious influence of large election campaign contributions on judicial impartiality. This issue is likely to arise repeatedly, not only in Alabama but in other states in which judges are selected in partisan elections.[12]

The second issue raised by the petition is whether when there have been large campaign contributions, as in this case, the Full Faith and Credit Clause requires that the decision automatically be given issue preclusion effect. Or

[12]Seven states besides Alabama select all of their judges in partisan elections. They are: Arkansas, Illinois, Mississippi, North Carolina, Pennsylvania, Texas and West Virginia. Twelve other states select only judges of original jurisdiction in partisan elections. American Judicature Society, *Electing Justice: the Law and Ethics of Judicial Election Campaigns*, Appendix A, 177 (1990).

does the Clause permit, or even require, an enforcing court to inquire into the impartiality of the rendering court and the fullness and fairness of the hearing accorded the litigant against whom the judgment is to be enforced?

Issue preclusion is by far the most perilous aspect of full faith and credit. It is rife with possible unintended consequences that can lead to a gross miscarriage of justice. Accordingly this Court has held that issue preclusion is applicable only when there has been a full and fair hearing on the issue to be foreclosed. This case provides an opportunity for a much needed elaboration of the requirements of a full and fair hearing under the Due Process and Full Faith and Credit Clauses of the Constitution.

The third issue raised by this petition relates to the fullness of a hearing as well as its fairness. Is a hearing full when a court *sua sponte* decides an issue of constitutional dimension on a legal theory that never was briefed or argued and then denies the losing party any opportunity whatsoever to show that the *sua sponte* decision was wrong? The Florida courts in this case have held that such a "hearing" is full for purposes of the Full Faith and Credit Clause of the United States Constitution, thereby leaving

Baker subject to the enforcement of a judgment of over $650,000 (including interest) even though he has *never* had a day in Court on the Alabama Supreme Court's flawed theory of personal jurisdiction over him. An interpretation of the Constitution that is so clearly contrary to common sense should not be permitted to stand.

Finally, the obverse of the first three issues is worthy of this Court's attention: Is it a denial of due process of law for a state court to apply issue preclusion under the aegis of the Full Faith and Credit Clause when there was not a full and fair hearing before any impartial tribunal on the issue sought to be precluded? Stated otherwise, to what extent does due process require an enforcing court to restrain its impulse to give full faith and credit until there is some form of inquiry into a claimed lack of bona fides in the judgment presented for enforcement?

The proper application of the Due Process and Full Faith and Credit Clauses in cases that present the issues set forth above requires guidance from this Court. At the moment there is room for considerable doubt as to what constitutes a fair and impartial rendering tribunal.

Similarly lacking is clarity as to the right and means available to a litigant -- particularly a non-resident -- to obtain a meaningful hearing in any forum in which the resulting judgment is presented for enforcement on whether the initial forum complied with constitutional standards. These are not matters on which the decision of the initial forum can be treated as conclusive for purposes of the Full Faith and Credit Clause. Just as no litigant can be a judge in his own case, no tribunal should be the final arbiter of its own fairness and impartiality.

POINT I

CERTIORARI SHOULD BE GRANTED TO CORRECT THE ERROR OF THE FLORIDA COURTS IN GIVING ISSUE PRECLUSION EFFECT UNDER THE FULL FAITH AND CREDIT CLAUSE TO THE DECISION OF THE ALABAMA SUPREME COURT BECAUSE THE MORE THAN $100,000 THAT COUNSEL FOR THE BENNETTS CONTRIBUTED TO ELECTION CAMPAIGNS OF JUSTICES OF THAT COURT AND ITS ANOMALOUS RULINGS GAVE RISE TO AT LEAST AN APPEARANCE OF IMPROPRIETY.

Television has turned out to be such an effective medium for conducting an election campaign that few candidates for public office can succeed without it. The problem is that television time is so expensive that almost every candidate has an insatiable need for campaign contributions.

Some members of the House of Representatives must raise $1,000 every working day of their two year term towards their re-election campaigns. Senators have six years in which to fill their coffers but statewide campaigns are very costly. Thus some senators from populous states may have to raise as much as $10,000 every working day. As a result, political action committees with large sums to disburse have grossly disproportionate influence on legislation.

The framers of the United States Constitution insulated the federal judiciary from any such baneful influence by granting judges tenure during good behavior. Most state court judges, however, are elected. In Alabama the term of a Supreme Court justice is *six* years.[13]

The American Judicature Society, in a 1990 study entitled "Electing Justice: The Law and Ethics of Judicial Election Campaigns," said the following at page xiii of the preface:

[13]Forbes magazine, in its February 1, 1993 issue, reported that two Alabama Supreme Court justices who faced contested re-election campaigns in 1992 raised nearly $500,000 each. In its January 1, 1994 issue, Forbes reported that the Chief Justice of Alabama spent $670,687 in his most recent re-election campaign.

> California, Ohio and Texas have all seen multi-million-dollar races since 1986[14] and campaigns costing hundreds of thousands of dollars have arisen in states from Alabama to Montana. Even if big money does not corrupt the candidates, it gives an appearance that is especially troubling in the case of the judiciary.

The study adds:

> Lawyers are the biggest contributors to judicial races. These same lawyers then often appear before the judges they helped to elect. Even if these contributions do not prejudice the candidates in favor of the contributing lawyers, they give the public the appearance of prejudice.

This Court has held issue preclusion (and, therefore, the Full Faith and Credit Clause) to be inapplicable when there is reason to doubt the quality, extensiveness, or fairness of

[14]American Judicature Society: *Electing Justice*, 25 declares:

> In 1988, candidates for the six open seats on the Texas Supreme Court rasied over $10 million; candidates for the Chief Justice position alone raised almost $4 million. Two years earlier in California, three sitting justices spent nearly $4.5 million in an unsuccessful effort to retain their seats on the state Supreme Court; individuals and groups working against their retention spent another $7 million. Also in 1986, the two candidates for Chief Justice of the Ohio Supreme Court spent over $3 million.

For a very comprehensive study of judicial election campaign contribution abuses see Note, Disqualifying Elected Judges From Cases Involving Campaign Contributors, 40 Stan. L. Rev. 449 (1988).

the procedures followed in prior litigation. In *Allen v. McCurry*, 449 U.S. 90 (1980), the Court stated the restriction on the applicability of collateral estoppel (issue preclusion) as follows:

> But one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate that issue in the earlier case. (Id. at 95.)

A year earlier in *Montana v. U.S.*, 440 U.S. 147, 164 n. 11 (1979), the Court did not require proof of actual unfairness but only "reason to doubt" the fairness of the prior proceeding.

The more than $100,000 that the Bennetts' lawyers contributed to the reelection campaigns of justices of the Alabama Supreme Court at a very minimum created an appearance of impropriety. Justices who had received generous contributions, and who would need such contributions again within six years, would be less than human if they were not tempted to tip the balance in favor of their benefactors.

In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), this Court reversed a decision of the Supreme Court of Alabama in a case that would have been a precedent in another case that concerned the justices personally. The judgment reversed was against an insurance company for bad faith refusal to pay a valid health insurance claim. The jury awarded $3.5 million in punitive damages.

The Alabama Supreme Court affirmed in a 5 to 4 decision. The Justice who wrote the majority opinion had filed a class action on behalf of himself and all other Alabama state employees insured under a group policy with Blue Cross-Blue Shield of Alabama charging them with bad faith failure to pay claims. This Court held that it was not necessary to show that the Justice actually was influenced by his financial interest. The Court said:

> We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "'would offer a possible temptation to the average * * * judge to * * * lead him not to hold the balance nice, clear and true.'" *Ward*, 409 U.S., at 60 (quoting *Tumey v. Ohio, supra*, at 532). The Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must

> satisfy the appearance of justice.'" (Id. at 825)

Baker's Florida action is not seeking to prevent enforcement of the Alabama judgment on the ground that it was procured by corruption. Such a claim would have imposed on Baker a very heavy burden of proof. What he is seeking is much simpler -- to prevent issue preclusion and the application of full faith and credit in Florida. For that purpose, Baker need only show that there was an appearance of impropriety (which is obvious in this case), not prove actual impropriety. See *Aetna Life Ins. Co. v. Lavoie, supra.*

The Florida courts did not permit Baker to investigate into, let alone get beyond, the appearance of impropriety. By granting summary judgment the Florida courts held *as a matter of law* not merely that appearance of impropriety is insufficient but that even establishing actual impropriety is irrelevant with regard to issue preclusion and, therefore, with regard to full faith and credit. This Court has ruled otherwise. *Allen v. McCurry*, 449 U.S. 90 (1980); *Montana v. U.S.*, 440 U.S. 147, 167 n. 11 (1979). Mere appearance of impropriety prevents issue preclusion and violates due process as well. *Aetna Life Ins. Co. v. Lavoie, supra.*

Clarification, therefore, is needed from this Court of an individual's right to question, before full faith and credit is accorded, the impartiality of the rendering tribunal and the fairness of the hearing it accorded.

This case involves more than large political contributions to judicial elections, which gave rise to an appearance of impropriety. The record shows that the Alabama Supreme Court actually tilted the scales of justice in favor of the Bennetts in a number of respects.[15]

The Bennetts, under Alabama law, had the burden of proof on personal jurisdiction. *Beasley v. Schuessler*, 519 So.2d 551 (Ala. Civ. App. 1987); *Tetco Metal Products, Inc. v. Langham*, 387 F.2d 721 (5th Cir. 1968). Yet the Bennetts introduced no evidence at the trial specifically related to personal jurisdiction over Baker. Nonetheless, the Alabama Supreme Court *sua sponte* strained to find jurisidiction over Baker in his role as counsel for his English client in the unrelated Gibbs purchase. When Baker sought to show that

[15]In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), in determining whether the impartiality of a judge might reasonably be questioned, this Court, considered the judge's controversial findings of fact even though the Court of Appeals had held there was enough evidence to support the trial court's findings. On the basis of its own review of the disputed findings, this Court held that the appropriate remedy was reversal thereby "allowing a new judge to take a fresh view of the issues." (Id. at 868).

this ruling transgressed the rulings of this Court, the Alabama Supreme Court denied him an opportunity to do so.

The Alabama Supreme Court also stretched to save the Bennetts even though they had not proved the intentional misrepresentation they alleged. In so doing the Alabama Supreme Court had to overturn two common law rules of law it had followed consistently in earlier cases. One is that a verdict must be set aside when a case is submitted to the jury over the defendant's objection on multiple theories and there is no evidence to support one or more of the theories.[16]

As was noted in the Statement of Facts at pages 9-11, the other departure from prior law in Baker's case was the holding that a defendant can be held liable for damages based on an innocent non-disclosure. Previous Alabama decisions had held, in accordance with the common law, that

[16]*Estes v. Nix*, 401 So.2d 62 (Ala. Civ. App. 1981), writ denied, 401 So.2d 64 (Ala. 1981); *American General Life Insurance Co. v. Lyles*, 540 So.2d 696 (Ala. 1989).

there is no liability for innocent non-disclosure.[17]

The Alabama Supreme Court tolerated misconduct by the Bennetts' counsel that went beyond constitutional limitations in appealing to regional prejudice. The Bennetts' counsel urged the Alabama jury to "stop lawyers in the biggest law firm in America," "New York lawyers," "from putting together abusive tax shelters," "costing the taxpayers 1.5 billion dollars a year." An impartial court would not have permitted that.

The Court completely ignored the likelihood that the Bennetts had actually benefited because the jury was influenced in finding liability and in its award of "compensatory" damages by the inflammatory arguments of Bennetts' counsel. Denying the common sense perception that prejudicial impressions of jurors cannot be so tightly compartmentalized, the Court declared that, since the jury refused to award punitive damages, Baker was not prejudiced. A comparable argument was rejected in *Pappas*

[17]Marshall v. Crocker, 387 So.2d 176 (Ala. 1980) (intent to suppress required); *Baker v. State Farm General Ins. Co.*, 585 So.2d 804 (Ala. 1991) (plaintiff must produce evidence of a present intent to deceive); At common law innocent non-disclosure is not even a ground for rescission. Restatement of Restitution §8, comment b. In any event, rescission could not have been granted in this case since Baker was not the seller.

v. Middle Earth Condominium Ass'n, 963 F.2d 534 (2d Cir. 1992) (prejudicial evidence offered on contributory negligence may have influenced the jury to hold defendant was not negligent), and in *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin*, 283 U.S. 520 (1931), this Court, in reversing a state court judgment, said:

> [N]o verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent. (Id. at 521)

The more than $100,000 of campaign contributions and the exceptionally favorable treatment accorded to the Bennetts, at a minimum, raise a serious question of fact whether Baker received a fair and impartial hearing from the Alabama Supreme Court on jurisdiction.

This Court has held that due process of law requires trial by an impartial tribunal. A judge who needs large campaign contributions every six years could be tempted to conclude that impartiality is too expensive a luxury when one of the litigants is a generous contributor. If a judge has a direct or

indirect financial interest in the outcome of a case, it is not necessary to show that the judge was influenced. The mere possibility that he might be influenced is a denial of the due process right to an impartial tribunal. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986). In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), a judge had no personal interest in a case. He was merely a trustee of a university that had an indirect contingent financial stake in the plaintiff's success in the action. This Court ruled that this was sufficient to establish that the impartiality of the judge might be questioned.[18] The prospect of receiving needed future campaign contributions, by contrast, is a direct personal interest.

Whether any judges should be elected and how their campaigns should be financed are plainly political questions, and Baker is not seeking any ruling from this Court on them. The Constitution, however, requires impartiality and

[18] *Liljeberg* was decided under the Federal recusal statute, Title 28 U.S.C. §455, which provides provides in relevant part that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This is equivalent to this Court's "appearance of impropriety" criteria under the Due Process and Full Faith and Credit Clauses, which Baker maintains were disregarded by the Florida courts.

fairness in the decision making process by whatever process judges are chosen.

The first issue being presented is what constitutes an impermissible appearance of impropriety in the context of the Full Faith and Credit Clause?

The second question is as to a litigant's right to a hearing when he claims that a judgment was rendered against him without due process of law, for example, by an appearance of impropriety in the intitial court? If an enforcing court is *not* required to give full faith and credit to such a flawed judgment but, nevertheless, does so, is the enforcing court itself thereby violating the Due Process Clause? Those are questions that only this Court can answer.

POINT II

CERTIORARI SHOULD BE GRANTED TO CORRECT THE ERROR OF THE THE FLORIDA COURTS IN FAILING, BEFORE GIVING FULL FAITH AND CREDIT TO THE ALABAMA JUDGMENT, TO ASCERTAIN WHETHER ALABAMA'S EXERCISE OF PERSONAL JURISDICTION OVER PETITIONER DENIED HIM DUE PROCESS OF LAW BECAUSE HE HAD NO CONTACTS WITH ALABAMA OTHER THAN UNSOLICITED TELEPHONE CALLS FROM ALABAMA TO HIM IN NEW YORK.

The Florida courts gave the Bennetts the benefit of preclusion under the Full Faith and Credit Clause of issues

that are neither mundane points nor of interest only to the Bennetts and Baker. They are constitutional issues that relate to whether the Alabama courts denied Baker due process of law in two fundamental respects.

The first was whether the Alabama courts denied Baker the most basic requirement of procedural due process -- an impartial tribunal (or at least one that did not have an appearance of impropriety). In this area, at least there is no conflict -- or gap -- between the Full Faith and Credit and Due Process Clauses. There can be no such thing as a hearing that fails to meet the requirements of due process but that is adequate for purposes of the Full Faith and Credit Clause. The Florida courts clearly erred in refusing to consider the due process, as well as the full faith and credit, questions raised by Baker.

The second issue on which the Bennetts' judgment was improperly given issue preclusion effect was whether the Alabama courts had personal jurisdiction over Baker, a Florida resident. This Court has held that "[t]he Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462,

471-72 (1985), quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

Baker never was in Alabama. Baker's limited activities relating to J.R. Bennett's purchase from Gibbs took place in New York. He sent nothing into Alabama -- not even a single sheet of paper. Baker represented neither party to the sale from Gibbs to J.R. Bennett and he did not participate in any of the negotiations. He neither sought nor received any legal fee or other benefit from the transaction.

If Alabama can obtain jurisdiction over a non-resident merely because telephone calls were made to him from Alabama, suits may be brought against non-residents in distant forums without regard to "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

Perhaps implicitly recognizing that the three telephone calls to Baker, standing alone, would not be a sufficient basis for exercising personal jurisdiction over him, the Alabama Supreme Court *sua sponte* held that Alabama had jurisdiction over Baker because he represented his English client in the earlier sale to Gibbs. That transaction, however, was completely independent of the sale by Gibbs to the

Bennetts. A partial resale by Gibbs was not contemplated at the time of Gibbs' purchase.

The Alabama Supreme Court did not specify whether it was holding that Alabama had general or specific jurisdiction over Baker. The Court's opinion contains no evidence that it took account of the different requirements for each. In any event, it is clear that neither existed.

In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), this Court pointed out the critical distinctions between general and specific jurisdiction. When a claim does not arise out of the defendant's forum activities, an action may be maintained against him or her only if the court has general jurisdiction. That requires the defendant's forum activities to be continuous and systematic -- for example, regularly doing or soliciting business in the state.

Baker's role in the Gibbs purchase was not "a contact of a 'continuous and systematic' nature." Baker never went to Alabama. He was not a party to the sale, merely a lawyer representing an out-of-state client. Not even his client was present in Alabama. Baker drafted sale and leaseback agreements relating to equipment located in England in his New York office. His only contact with Alabama was sending the agreements there for signature on behalf of his

English client. Gibbs returned the partially executed agreements to New York to be forwarded for execution by Baker's client in England.

When the defendant's forum contacts are isolated and sporadic, the forum cannot assert long arm jurisdiction unless the claim sued on arose from his contacts with the forum state. Baker's only contacts with Alabama in connection with Gibbs' sale to J.R. Bennett were three unsolicited telephone calls from Alabama. The innocent non-disclosure for which he was held liable occurred (if at all) in New York. The professional misconduct and intentional misrepresentation which the Bennetts alleged in their complaint (but failed to prove) also would have occurred in New York.

If unsolicited interstate communication can be the basis for jurisdiction and the automatic application of forum law, an individual businessperson, doctor, or lawyer faces the prospect of having to defend, and being subject to local law, in every distant forum from which he or she received a telephone call, a facsimile transmission, or an electronic mail message.

This Court has held that state laws violate the Commerce Clause when they have the effect of inhibiting or

burdening interstate commerce. See, e.g., *Southern Pac. Co. v. State of Arizona*, 325 U.S. 761 (1945); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959). This Court said in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988):

> Nevertheless, state interests that are legitimate for equal protection or due process purposes may be insufficient to withstand Commerce Clause scrutiny. (Id. at 894)

Permitting jurisdiction and choice of law to be based solely on unsolicited interstate telephone calls and possibly E-mail, fax transmission, or other forms of interstate communication dwarfs the burdens on interstate commerce in the cases cited. As early as *Davis v. Farmers Cooperative Equity Co.*, 262 U.S. 312 (1923), this Court recognized that subjecting a railroad to lawsuits in distant forums places an intolerable burden on interstate commerce in violation of the Commerce Clause. That Clause was applied to prevent the exercise of jurisdiction by states without regard to whether the Due Process Clause of the Fourteenth Amendment would have been applicable.[19]

[19]This Court said in *Davis*: "Since we hold that the Minnesota statute as construed and applied violates the commerce clause, we have no occasion to consider whether it also violates the Fourteenth Amendment." (Id. at 318)

In *Atchinson T. & S. F. Ry. Co. v. Wells*, 265 U.S. 101 (1924), this Court permitted a collateral attack on a judgment obtained in violation of the Commerce Clause even though the court that rendered the judgment had jurisdiction. Jurisdiction had been obtained by garnishing in a Texas court amounts owed to the Atchinson, Topeka & Santa Fe Railroad ("Santa Fe"). The garnishee objected to the jurisdiction, but its objection was overruled and judgment was entered in plaintiff's favor. Santa Fe sued in a federal court to enjoin enforcement of the judgment, a collateral attack. This Court said:

> Relief against the void judgments entered was properly sought by the Santa Fe in the federal court. (Citing cases.) The garnishment was void because seizure of the rolling stock and credits for the purpose of compelling the Santa Fe to submit to the jurisdiction of the Court in the Wells suit interfered unreasonably with interstate commerce. The Santa Fe was not obliged to assert its rights in the courts of Texas. (Id. at 103)

Surely the public's interest in avoiding unreasonable obstructions to and undue burdens on interstate communications is just as great today as its interest in avoiding obstructions or burdens on transporting goods was seventy years ago. If Alabama could exercise personal

jurisdiction because of unsolicited telephone calls from Alabama by the Bennetts' accountants made to Baker in New York, why would not a telephone call to an out-of-state lawyer or doctor (or any other citizen) from Atlanta, Dallas, or Los Angeles equally subject the recipient to suit in the courts of Georgia, Texas, or California? If so, could Georgia, Texas, or California then apply its own law to impose liability on the non-resident, who would not be liable under the law of the state in which he or she lives and works? The example differs only in a slight degree from what was done to Baker in Alabama. Florida further undermined the constitutional protection by refusing to examine the circumstances under which the Alabama decision was reached.

What the foregoing discussion demonstrates is a need for clarification by this Court of the respective domains of the Full Faith and Credit Clause and the Due Process provision of the Fourteenth Amendment. The Florida courts in effect have created a constitutional gap by failing to honor the dictate of the Due Process Clause and overzealously enforcing the Full Faith and Credit Clause. They have ruled that they must give full faith and credit to a judgment without regard to whether the judgment was obtained in violation of due process. The Florida courts have given

issue preclusion effect to a decision of a court that had every appearance of partiality, and they have denied Baker any opportunity to determine whether there was actual partiality.

This Court should grant certiorari so that it will have an opportunity to make clear that the Constitution does not leave an inexplicable discontinuity between full faith and credit and due process of law. Myopic application of Full Faith and Credit Clause must not be permitted to impair fundamental rights under the Due Process Clause.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Arthur R. Miller
Attorney for Petitioner
1545 Massachusetts Ave.
Cambridge, Massachusetts 02138
Tel.: (617) 495-4111

SUPPLEMENT

American Judicature Society, *Electing Justice: A Handbook of Judicial Election Reforms (1990) pages 47-8:*

- Within two days of filing suit against Texaco, Pennzoil attorney Joe Jamail gave $10,000 to the campaign fund of trial court judge Anthony Farris - the largest re-election contribution the judge had ever received. Even before Pennzoil was awarded a $10.3 billion judgment against Texaco, and all but $2 billion of the award was upheld by the Texas Court of Appeals, the parties and their attorneys began contributing to members of the Texas Supreme Court. In total, Pennzoil's lawyers gave more than $315,000 and Texaco attorneys contributed $73,000 to supreme court justices, three of whom were not even up for re-election. The Texas Supreme Court decided not to hear Texaco's appeal.

- In 1983 and 1984, attorneys contributed 43% ($272,679 of $639,222 total) of judicial campaign funds raised in California. California Supreme Court justices, who, unlike trial judges, do not face opponents, depended most heavily on attorneys for campaign funds (75%, compared to under 40% for

trial judges) and received the largest average contribution from individual lawyers ($959 compared to $428 for southern California and $216 for northern California trial judges).

- In 1986, Ohio Supreme Court Justice Frank Celebrezze received $350,000 of his $1.7 million war chest from labor unions, but lost the election due, in large part to reports that $10,000 came from union officials with ties to organized crime. The successful candidate, Thomas Moyer, was heavily supported by business; he received $50,000 from medical PACs alone. Shortly after Moyer assumed office, the court announced that it would rehear 30 cases decided in the last weeks of Celebrezze's term, but abandoned the plan when a Cleveland newspaper revealed that lawyers in 5 of the cases made large contributions to Moyer's campaign.

- Pennsylvania judge-elect Cunningham promised to "remember" a union official's "friends," in exchange for a cash contribution of $500 and the union's promises to pay her outstanding campaign debts and to support her husband's future campaign for judicial office. The union was a frequent litigant in the

judge-elect's court.

- Cook County, Illinois, attorneys have typically contributed more to judicial candidates who have run unopposed or who have already won the primary elections and were likely to win the general election, suggesting that these attorneys hoped to curry favor with judges.

- New York Supreme Court Justice Jerome D. Cohen (a trial judge) accepted below market-rate interest loans from a credit union to finance his judicial campaigns, knowingly allowed the credit union to apply the entire amount of his payments to principal with the result that he received interest-free loans for five years, and ordered nearly $250,000 in minors' funds to be deposited with the credit union even though no judge in his court had ever used a credit union as a depository.

High campaign costs and low profile elections make judicial candidates inordinately dependent on a small pool of contributors who do not represent the interests of the larger community -- lawyers, organizations that frequently litigate before the court (e.g., businesses and unions), and PACs. Candidates' dependence on these groups can create

the impression that justice is for sale, i.e., that judges will be unduly influenced by their supporters or will adopt the positions taken by their supporters. This impression is strengthened when contributions are large. Moreover, lawyers and litigants are the persons most likely to be approached for contributions. They are often unwilling to contribute, but feel they must in order to receive justice.